

The record consists of the transcript of regular hearing, dated August 13, 1996; the transcript of the continuation of the regular hearing, dated October 14, 1996; the deposition of Gregory L. Pucci, M.D., dated September 25, 1996; the deposition of Charles C.

Reeder, M.D., dated October 22, 1996; the report of Revis C. Lewis, M.D., dated April 1, 1996; the exhibits offered into evidence by the parties; and the pleadings and correspondence contained in the administrative file.

STIPULATIONS

The following stipulations were made by the parties:

The claimant, Charles A. Williams, was allegedly injured January 2, 1993 through August 25, 1994, in Wyandotte County, Kansas, while in the employment of Jack Cooper Transport Co., Inc., who was insured by Liberty Mutual Insurance Company at the time. Both parties were under the jurisdiction of the Kansas Workers Compensation Act at the time of the injury. The average weekly wage is unknown but it would be the maximum compensation rate in effect for whatever date the court finds as the date of accident. No temporary total disability compensation has been paid.

ISSUES

- (1) Whether claimant met with personal injury by accident on any or all of the days he worked from January 2, 1993 through August 25, 1994.
- (2) Whether claimant's alleged accidental injury arose out of and in the course of his employment with respondent.
- (3) Whether respondent had notice of claimant's alleged accidental injury.
- (4) Whether a written claim was filed in a timely manner.
- (5) What claimant's average weekly wage was at the time of the alleged accident.
- (6) Whether claimant is entitled to temporary total disability compensation for the 16.57 weeks from August 26, 1994 through December 19, 1994.
- (7) Whether claimant should be entitled to any past medical expenses.
- (8) Whether claimant should be entitled to any future medical treatment.

- (9) Whether claimant should be entitled to any unauthorized medical expense.
- (10) The nature and extent of the disability, if any, the claimant suffered as a result of his alleged accident.
- (11) What amount of compensation, if any, is due as a result of the claimant's alleged accident.
- (12) Whether the Fund should be liable for any of the compensation awarded.
- (13) If it is found that the Fund is liable, what part of the liability should be assessed against the Fund.
- (14) Whether a credit exists under K.S.A. 44-510a for Docket No. 177,853.
- (15) If it is found the Fund is not liable, whether attorney fees should be assessed against the respondent for defense of this matter by the Fund and, if so, the amount.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant was previously awarded benefits against the respondent in Docket No. 177,853 based upon a 5 percent permanent partial disability resulting from a December 14, 1992, injury to his neck and cervical spine. Claimant continued working for respondent and now alleges a permanent aggravation of that prior neck injury from a series of accidents beginning January 2, 1993 and continuing each and every day worked through August 25, 1994. The Administrative Law Judge denied claimant's present claim for compensation for a lack of proof that he sustained further injury and for a failure to give proper notice of accident to the employer. The Appeals Board finds that claimant did give timely notice of accident by letter dated August 21, 1994 as well as by conversations claimant had with his supervisors on or about August 25, 1994 when he advised he was no longer able to continue working due to the worsening of his condition. The Appeals Board further finds claimant has met his burden of proving a permanent aggravation of his preexisting condition from his work and is therefore, entitled to workers compensation benefits. The finding of claimant's last day worked as the date of accident resolves the issue of timely written claim in favor of claimant.

In Docket No. 177,853 the Administrative Law Judge referred claimant for an independent medical examination by Revis Lewis, M.D., a neurosurgeon. Based largely upon the opinions of Dr. Lewis, the Administrative Law Judge found claimant had indeed sustained a work-related injury and ordered permanent partial disability benefits based

upon the 5 percent functional impairment rating given by Dr. Lewis. In this case, the Administrative Law Judge again ordered an IME by Dr. Lewis who found a permanent worsening of claimant's condition. Due to this work-related aggravation, Dr. Lewis opined that claimant now has a permanent impairment in the neighborhood of 20 percent to the body as a whole.

The record in this case also contains the deposition testimony of claimant's family physician, Charles C. Reeder, M.D., and of neurosurgeon, Gregory L. Pucci, M.D. The evidence shows claimant had a degenerative arthritic condition in the cervical spine. However, it is uncontroverted that claimant's continued work activity made his condition worse. This aggravation continued through to his last date of employment on August 25, 1994, which is found to be the claimant's date of accident. See Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

Since the date of accident is found to be after July 1, 1994, the Kansas Workers Compensation Fund has no liability for this claim.

Claimant has returned to work with respondent and is earning a wage comparable to that which he was earning at the time of his accident. Accordingly, he is not entitled to permanent partial disability benefits beyond the percentage of his functional impairment. In fact, claimant is not making claim for work disability. Claimant should be awarded permanent partial disability benefits based upon the 20 percent functional impairment rating given by Dr. Lewis minus the preexisting 5 percent, for a 15 percent permanent partial disability. Respondent's request for a K.S.A. 44-510a credit for the 5 percent permanent partial disability award in Docket No. 177,853 in addition to the reduction for the preexisting 5 percent functional impairment is denied.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Robert H. Foerschler dated January 7, 1997, should be, and is hereby reversed and an award of compensation is hereby made in accordance with the above findings in favor of the claimant, Charles A. Williams, and against the respondent, Jack Cooper Transport Co., Inc., and its insurance carrier, Liberty Mutual Insurance Company, for an accidental injury which occurred August 25, 1994, for 16.57 weeks of temporary total disability compensation at the rate of \$319 per week or \$5,285.83 followed by 62.01 weeks of permanent partial disability at the rate of \$319 per week or \$19,781.19 for a 15% permanent partial disability all of which is currently due and owing.

Claimant is entitled to payment of all outstanding authorized and related medical treatment expenses, unauthorized medical up to the statutory limit upon presentation of itemized statements, and future medical upon proper application to and approval by the director.

Liability against the Fund is denied except for its attorney fees.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

Richard Kupper & Associates	\$950.85
Hostetler & Associates, Inc.	\$135.05

IT IS SO ORDERED.

Dated this ____ day of May 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert W. Harris, Kansas City, KS
Stephanie Warmund, Kansas City, MO
Bruce D. Mayfield, Overland Park, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director